[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10370

Non-Argument Calendar

D.C. Docket No. 99-001 89-CR-ORL-9

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE A. PEREZ MENCHACA,
a.k.a. Jose A. Perez,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

(September 27, 2001)

Before TJOFLAT, CARNES and BLACK, Circuit Judges.

PER CURIAM:

Jose A. Perez was indicted in a 31-count indictment involving offenses stemming from an operation to sell "kits" containing gamma butyrolactone ("GBL") to make gamma hydroxybutyrate ("GHB"). Perez entered into a plea agreement, wherein he agreed to plead guilty to Count 1 of the indictment in exchange for the dismissal of the remaining counts against him. Both the terms of the plea agreement and the change-of-sentencing hearing in the district court addressed the maximum sentence that Perez could receive, the fact that the sentence would be determined by applying the applicable sentencing guidelines, the meaning of the sentence-appeal waiver, and the contents of the factual proffer to support a guilty plea to Count 1. Applying sentencing enhancements and reductions, the district court determined that Perez' guideline range, based on a total offense level of 20, was 33 to 41 months. It sentenced Perez to 38 months' imprisonment.

Proceeding pro se, Perez now appeals his conviction and 38-month sentence on five grounds. First, he contends that the indictment was insufficient because it failed to state a criminal offense. Specifically, he argues that GHB is a dietary

supplement instead of a drug and, therefore, that the selling of GHB cannot support a charge of conspiring to violate the Food, Drug, and Cosmetic Act ("FDC Act") by introducing a misbranded drug into interstate commerce, as charged in Count 1 of the indictment. Because Perez challenges his indictment for the first time on appeal, the indictment must be held sufficient unless it is so defective that it does not, by any reasonable construction, charge the offense to which Perez pleaded guilty. See United States v. Pease, 240 F.3d 938, 943 (11th Cir. 2001).

Whether the classification of GHB and GBL as drugs under the FDC Act is proper is an issue of first impression. The FDC Act defines "drug" to include (1) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, (2) articles (other than food) intended to affect the structure of any function of the body of man or other animals, and (3) articles intended for use as a component of any article otherwise defined as drug. 21 U.S.C. § 321 (g)(I)(B)-(D). The plain language of that statute supports a finding that GHB and GBL were properly classified as drugs in the indictment. The indictment clearly indicated that Perez and his co-conspirators represented that GHB "cured alcoholism and depression, induced sleep and 'heightened sexual feelings,' burned body fat, extended human life, and increased muscle size and mass," and, thus, was a drug under the statute. Further, GBL was defined as a drug by the indictment because it was "an

article intended for use as a component of GHB." Moreover, Perez' plea agreement contained a factual basis for the plea because Perez admitted that he knew his customers were using the GHB in a manner consistent with the description contained in the indictment. Therefore, the indictment sufficiently charged Perez with a conspiracy offense under 18 U.S.C. §371.

Second, Perez contends that his conviction should be vacated because the definition of misbranded drug under the FDC Act is unconstitutionally vague as applied to this case. Because Perez did not challenge the constitutionality of the statute in the district court, we review that argument only for plain error. See United States v. Reynolds, 215 F.3d 1210, 1212(11th Cir.), cert. denied, 531 U.S. 1000, 121 S. Ct. 500 (2000). Under plain-error review, four prongs must be met: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. United States v. Gallego, 247 F.3d 1191, 1196 (11th Cir. 2001) (citations omitted). An error can be plain under current law only if there is clear precedent from this Court or the Supreme Court resolving the issue. United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000).

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct

is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 5. Ct. 1855, 1858 (1983) (citations omitted). In this case, Perez has provided no authority showing that the definition of "drug" is unconstitutionally vague, and he has provided no reason why an ordinary person could not understand that GHB and GBL, as sold to enhance body functions in the manner described in the indictment and plea agreement, would not fall under the definition of "drug" under § 321(g)(l). No case law in this Circuit or in the Supreme Court discusses the vagueness of the definition of "drug" under § 321 and its affect upon the constitutionality of a prosecution for misbranding drugs with the intent to defraud or mislead under § 331 and § 333. Accordingly, Perez' conviction for conspiring to violate the act did not result in plain error. See Aguillard, 217 F.3d at 1321 (error is only plain if there is clear precedent resolving the issue).

Third, Perez contends that his guilty plea was not entered into knowingly and voluntarily. Because he did not object to the acceptance of his guilty plea in district court, we review his plea only for plain error. United States v. Mosley, 173 F.3d 1318, 1322 (11th Cir.1999). A knowing and voluntary plea requires satisfaction of three core principles: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea." United States v. Jones, 143 F.3d 1417, 1418-

19 (11th Cir. 1998). The plea colloquy properly satisfied those principles, and Perez' three arguments to the contrary fail.

His first argument, that he did not know whether he was pleading guilty to a misdemeanor or a felony, is without merit. He has failed to cite to, and we have not found, any authority to demonstrate why the classification of his crime as a misdemeanor or a felony would affect his understanding of the charges against him, the consequences of his plea, or otherwise result in coercion to plead guilty, given that he was correctly advised of the sentence range. The district court clearly explained that the offense to which Perez pleaded guilty carried a maximum sentence of five years' imprisonment. Of course, that means the offense is a felony. See 18 U.S.C. § 3559(a)(5). The failure to specifically inform that Perez was pleading guilty to a crime classified as a felony and not a misdemeanor was not plain error. See Aguillard, 217 F.3d at 1321.

Perez' second argument, that he was unaware GHB was found naturally in mammalian tissue when he pleaded guilty, is also without merit. The manner in which GHB was utilized resulted in its classification as a drug under the FDC Act. Accordingly, the natural occurrence of GHB would not have been relevant to establishing the factual basis for the offense to which Perez pleaded guilty or the validity of the charges levied against Perez.

Perez' third argument, that he was unaware that he would be sentenced based upon an amount of victim loss

equaling $164,896 and that his guideline range would be beyond 0-6 months, likewise lacks merit. When determining whether a defendant understands the consequences of a plea, the district court is not required to inform him of an estimate of his sentencing guideline range; it need only advise the defendant of the existence of the sentencing guidelines and the fact that they would affect his sentence. See Mosley, 173 F.3d at 1327-28. The district court informed Perez that he could be sentenced up to the five-year maximum penalty, and that it could not determine the exact guideline range for his case until after the presentence investigation report was completed. The court further informed him that, when calculating his guidelines sentence, it would take into account various factors, including the effect of his offense upon the victims of it. The district court did not plainly err in finding that Perez' guilty plea was entered into knowingly and voluntarily.

Perez' fourth contention challenges the application of the sentencing enhancements that the district court applied in determining his guideline sentence. But his plea agreement contained a provision waiving his right to appeal his sentence except in limited circumstances, none of which exist here. We have recognized that appeal waivers are valid if entered into knowingly and voluntarily. United States v. Buchanan, 131 F.3d 1005, 1008 (11th Cir. 1997). For such waiver to be valid, a district court must specifically question the defendant concerning the sentence appeal waiver during the plea colloquy, unless it is otherwise clear from the record that the

defendant understood the significance of the waiver. Id. The record shows that the district court specifically questioned Perez regarding the waiver to ensure that he entered into the waiver knowingly and voluntarily. Accordingly, that waiver was valid. Because none of Perez' challenges to his sentence falls into the limited issues reserved for appeal by the appeal waiver, Perez has waived his right to challenge his sentence based upon the grounds he now asserts.

Finally, Perez contends that the district court constructively amended the indictment by basing his sentence upon conduct that was not part of the conduct to which he pleaded guilty. Perez misunderstands the concept of a constructive amendment to the indictment, which occurs when a district court provides jury instructions that so modify the elements of the charged offense that a defendant may have been convicted on a ground not alleged in the indictment. See United States v. Simpson, 228 F.3d 1294, 1299 (11th Cir. 2000). In this case, Perez pleaded guilty to the indictment, and no constructive amendment to the indictment occurred.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

6:99-cr-189-Orl-22JGG

-vs-

JOSE A. PEREZ MENCHACA
a/k/a: Jose A. Perez

William J. Sheaffer, Esquire (Retained)
609 E. Central Boulevard
Orlando, Florida 32801

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the defendant is adjudged guilty of such count which involves the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE OFFENSE
18 USC 371	Conspiracy to Introduce a Misbranded Drug Into Interstate Commerce

DATE OFFENSE
CONCLUDED COUNT
Oct. 1997 One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

Counts Two through Six and Nineteen through Twenty-Nine are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.	583-51-9346
Date of Imposition of Sentence:	January 12, 2001
Defendant's Date of Birth:	05-25-51
Deft's U.S. Marshal No.:	241 72-018

Defendant's Mailing Address:
321 Alba Lane
Lake Mary, Florida 32746

/s/

ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

JOSE A. PEREZ MENCHACA Page _ of _
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-EIGHT (38) MONTHS.

The Court recommends to the Bureau of Prisons that the defendant be designated to a facility in Central Florida where he may be near his family.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on or before 2:00 P.M. on February 15, 2001, as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on 2-15-01 VS to FCC COL
at _____, with a certified copy of this judgment.

/s/ R.D. Swope, Warden
UNITED STATES MARSHAL

By: /s/
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The mandatory drug testing requirements are suspended based on the defendant's posing a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the Instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such

substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

No additional conditions of supervised release were imposed.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The

defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$100	$6,000.00	

The Special Assessment shall be due immediately.

FINE

A fine in the amount of $6,000.00 is imposed.

RESTITUTION

No restitution was ordered. No restitution was ordered. The Court finds that determining the amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution is outweighed by the burden on the sentencing process.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) non-federal restitution; (3) federal restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

✓ In full and due immediately.

Any payment ordered under Part II, must comply with 18 U.S.C. § 3572, 18 U.S.C. § 3664(n), and include a provision under 18 U.S.C. § 3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the Court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. All criminal monetary

penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court granted the defendant only 1 level for acceptance of responsibility due to his false testimony in Court.

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 20
Criminal History Category: 1
Imprisonment Range: 33 to 41 months
Supervised Release Range: 2 to 3 years
Fine Range: $7,500 to $75,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

[ ] The court finds pursuant to 18 U.S.C. § 3364(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

[ ] Restitution is not ordered because:

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3863(a)(l)(A) and the court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i), determining an order of restitution not to be appropriate.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3563(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(l); pursuant to 18 U.S.C. § 3663(s)(1)(B)(ii), It has been determined that the complication and

prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

[ ] the defendant was convicted of a qualifying offense under 18 U.S.C. § 3863A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(A). the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

[ ] the defendant was convicted of a qualifying, offense under 18 U.S.C. § 3663A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3883A(c)(3)(B), the court finds from facts on the record that determining complex issues of fact related to the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance. [Departure to Level *]

[ ] for the following reason(s):